

13 August 2019

Plan International Hong Kong
Submission to the Law Reform Commission on
“Consultation Paper on Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult”

Plan International Hong Kong (“PIHK”, “we”) is an independent development and humanitarian organisation that advances children’s rights and equality for girls. We recognise the power and potential of every single child and we support children’s rights from birth until they reach adulthood.

Plan International is fully committed to ending violence against children and promoting a safe and harmonious society to children and young people, especially to gender equality. With 80 years’ accumulation of knowledge, practices and processes on protecting children, we have developed and enforced a gender-sensitive child safeguarding policy in place to ensure our high quality child protection performance. This is also why we strongly advocate the same approach to be adopted within and across organisations who also work with children, i.e., a holistic system strengthening approach *to ensure both preventive and responsive measures are in place so that no child is subject to any form of harm* as a result of their association with the organisations or communities at large. We adopt this systemic approach in our programming and influencing work with the ultimate aim to institutionalize and embed policies to protect children’s rights at all levels in Hong Kong.

The purpose and intention of this new proposal is to protect children and ensure children’s right to protection is ratified. According to the Basic Law, Article 39, the International Covenant on Civil and Political Rights applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region¹, where it clearly states that

*Art. 24: “(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, **the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State**”²*

We greatly support the Hong Kong government to take every step to actualize children right and as stated in the mentioned Covenant.

¹ Chapter III : Fundamental Rights and Duties of the Residents. (n.d.) The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. Available from: https://www.basiclaw.gov.hk/pda/en/basiclawtext/chapter_3.html

² International Covenant on Civil and Political Rights (n.d.) United Nations Human Rights Office of the High Commissioner. Available from: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

Therefore, we highly appreciate the Law Reform Committee’s plan on the proposal of the new offence as an initiative to protect children from harm by motivating the community to uphold their duty of care. Apart from placing the responsibility on the primary carers or parents of the child victims, we see eye to eye to the LRC in acknowledging in particular the professional responsibility of child-related professionals in safeguarding the best interests and personal safety of children, especially the infants and vulnerable children who cannot speak of themselves. In this regard, we strongly believe that the LRC will agree with us that the main purpose of the new offence is not to solely ‘find the culprit’ or find a way to impose criminal liability for serious injuries suffered by child victims, but to make real progress to child protection, by serving a deterrent to similar actions or inactions in the future in order to honour the notion of *‘prevention is better than cure’ and ‘it takes a village to raise a child’*.

With this purpose in mind, we have laid down our comments and suggestions as follows for the new offence to better serve its purpose of ‘preventing harm against children’ after a thorough consideration of local situation in Hong Kong and what we see as professionals working around children.

Children’s right to protection can only be fully actualized not only by establishing new offences in laying out the criminal liability, but also by establishing a robust and proactive child protection system and procedures, ranging from early identification on suspected child abuse, reporting of alleged cases, appropriate investigation, as well as subsequent follow-up services to the victims and families. And thus we intend that care should be taken to define the scope of the offence and also create an enabling environment for child-related professionals to fulfil their child safeguarding responsibility by taking an urgent, comprehensive review on the existing child protection system.

Executive Summary

- We welcome the new offence ‘failure to protect’ as an initiative to protect children from harm by motivating child-related professionals to uphold their duty of care to children.
- We recommend unifying the definition of children under different laws and legislations as accordance to UNCRC, i.e. under the age of 18.
- We recommend the minimum age of the defendant of this offence should be set at 18 years old, considering that children should not be held accountable for protecting other children from harm.
- We suggest that the definition of ‘serious harm’ and its scope should include psychological harm.
- We recommend that the new offence should be supplemented by a robust and proactive child protection system, as well as a range of policies and measures so to create an enabling environment for child-related professionals to better fulfil their child safeguarding responsibility to protect the child victim.

- In light of the difficulties child-related professionals are facing in reporting child abuse to external authorities, the following measures should be implemented to enable them to blow the whistle when necessary.
 - i. Establish a clear reporting guideline
 - ii. Whistleblower legal protection
 - iii. Make the institution accountable in reporting institutional child abuse and setting up Child Safeguarding Policy
 - iv. Provide child safeguarding awareness building and education to child-related professionals
 - v. Involve children in their own protection
 - vi. Establish a robust and proactive child protection system to follow up child abuse allegations
- Education and awareness enhancement programmes shall be reinforced by the government and thus enhance the child-related practitioners' and children's sensitivity to potential risks of harm, to enable early identification of harm and early intervention into child abuse cases.

A. Scope of the offence

(1) Minimum age of the defendant

Recommendation 1

We recommend that the minimum age for the defendant should be set at **18 years old**.

We notice that one of the recommendations proposed by the sub-committee is that 'no minimum age for the defendant should be stipulated in the offence', meaning that children just over the age of 10 could be prosecuted under this law, given that the minimum age of criminal responsibility in Hong Kong remains 10 years of age. We are seriously concerned that this recommendation might unreasonably put children at risk of prosecution, while at the same time may not serve the purpose the law is stipulated for.

We understand from the consultation paper that the purpose of the new offence is to 'effectively impose criminal liability for serious injuries suffered by children or vulnerable persons' on those who fail to take reasonable steps to protect the victim from being harmed. In this regard, we believe it is ultimately the adults' responsibility to protect children from harm, and therefore we do not think that any underage child (according to the UNCRC, any person under 18 years old) should reasonably be expected to take steps to protect the child victim from harm and be prosecuted for not doing so. The International Covenant on Civil and Political

Rights Article 24, which is applied to Hong Kong in Basic Law Article 39, stipulates that ‘every child shall have the right to measures of protection...on part of his family, society and state’, clearly placing the civil responsibility to protect the child on his family or society in large but not other children or the child victims themselves. Although children may be witnesses to abuse taking place in residential care institutions or at home, and should be encouraged to speak out, it should be the ultimate responsibility of the adult, not the other children, to protect the child victim from harm.

We notice that the committee has mentioned ‘defences will be available to young defendants’ who cannot be reasonably expected to take any appropriate steps under the duress of extreme domestic violence. However, we believe no child witnesses should be reasonably expected to take appropriate steps, as they are already one of the victims under violence just by witnessing the abuse taking place. Research indicates that a child who barely witnesses domestic violence or abuse taking place (even if he/she is not battered physically) may already suffer from trauma and are at serious risk for long-term mental problems³. Therefore, expecting any traumatized child witness to take appropriate steps to help the child victim and putting these children at risk of prosecution is unreasonable.

We understand that one of the considerations the committee might have is to ‘create an incentive for people who have witnessed or are aware of the abuse to tell what happened’ by imposing potential criminal liability on them. While we acknowledge that this might be effective for some adult bystanders, we contend that there are much better ways to encourage child bystanders to speak out than to put them at risk of prosecution, like educating children about their rights and establishing more child-friendly complaint procedures in the child welfare system. Instead of motivating child witnesses to tell the truth with the threat of prosecution, ensuring that their account of the event would be taken seriously by adults in the complaint or legal procedures can better serve the purpose of motivating children to speak out when child abuse happens to them or other children they know.

Considering how the minimum age for the defendant should be set, we believe we could benchmark it with the related existing offences in Hong Kong. The minimum age of defendant for Cap. 212 Offences against the Person Ordinance 27 ‘Ill-treatment or neglect by those in charge of child or young person’ is *16 years old*, meaning that only persons over 16 years old could be charged for ‘willfully assaults, ill-treats, neglects, abandons or exposes a child or young person.’. This new offence of ‘failure to protect’ requires the defendant to ‘take reasonable steps’ to protect the victim even if he/she is not one of the abusers, which requires the person to take much more care than ‘not to willfully harm a child’. If we believe that any person under the age of 16 should not be charged with Cap.212 Offences against the Person

³ Masbad, A., Tyler-Balkcom, C., & Walden University. Psychology. (2007). Childhood exposure to domestic violence [electronic resource]: Posttraumatic stress symptomatology and the effects of resilience on short- and long-term outcomes.

Ordinance 27 that put only active abusers to prosecution, why should we expect anyone under this age to be charged with this new offence?

Meanwhile, we are also aware that Hong Kong government has put 16 years old as a bar in many other policies, rules and regulations to reflect public expectation on certain level of maturity for those 16-17 year-old children. We understand the concerns behind such arrangements, and we advise that civil liability or rehabilitation rather than criminal liability should be more appropriate for 16-17 years old children who fail to take reasonable steps to protect other children from harm.

Apart from raising our concern over the minimum age of defendant for this particular offence, we also urge the government to review the current framework for criminal responsibility of children. The age of criminal responsibility in Hong Kong, which is currently set at 10 years old, is too low and endangers the interests of children who may be deprived of the benefit of their families, education and development while they remain incarcerated during their tender years. An urgent review of the criminal responsibility of children is both in the interests of the children and also the society as a whole.

(2) *Age of the Victim*

Recommendation 2

We recommend that the ‘**child**’ should be defined as a person **under 18 years of age** to align with the United Nations Convention on the Rights of the Child.

The LRC proposed that the ‘child’ should be defined as ‘a person under 16 years of age’, and ‘vulnerable person’ should be defined as a person aged 16 years or above whose ability to protect himself or herself from an unlawful act or neglect is significantly impaired.

In this regard, we strongly propose that the ‘child’ should be defined as a person under the age of 18 to align with the United Nations Convention on the Rights of the Child (UNCRC), and ‘vulnerable person’ should be defined as a person aged 18 years or above. Any underage children should be protected from serious harm, and it is the duty of us, the adults, to protect them from harm. Sound explanations need to be provided if a lower age limit than that defined by the UNCRC is proposed.

(3) *Definition of serious harm*

Recommendation 3

We recommend that the definition of ‘**serious harm**’ should include ‘**serious bodily and psychological harm**’.

One of the recommendations in the consultation paper is that a statutory definition of ‘serious harm’ should not be included within the terms of the offence. While we agree that having no express definition can allow flexibility for development through the common law, we are concerned that the ordinary meaning of the common law concept of ‘really serious bodily harm’ might be too narrow and do not include psychological harm.

There are some anonymous real cases that may help elaborate the case.

Case 1: A boy named Tom, aged 10, has been staying in foster care service since his age of 2. Since Tom’s birth, he has been put into residential care service as his parents were not capable of taking care of him; yet they were also reluctant to relinquish their parental rights and refused to place Tom to adoption. Since then, Tom found himself rotating from different residential care centers and foster care families. His parents visited him occasionally but always told him he was an unwanted child. At age 10, primary 4, Tom was found at the staircases of his foster home and attempted to commit suicide. He told the social worker ‘I am an unwanted child and is not welcomed to this world’. Luckily Tom was rescued and his life was saved. But he was diagnosed with attachment disorder and suffered from severe depression. There were many professionals engaged in Tom’s case, but no one took his situation seriously and no one took him to seek psychological help nor persuade his parents to allow Tom go for adoption process. He felt himself being left alone without any help from his family and other professionals. Finally, he attempted to commit suicide after being psychologically abused for 10 years, showing how long-term psychological harm could bring serious harm or even death of a child.

Case 2: A girl who was groped and sexually harassed by her father every night in her childhood might not have any ‘really serious bodily harm’, but the long-term mental problems it left are huge. Sexual offences could cause serious psychological harm and long-term mental problems to the victim, especially when the victim is a child⁴. Research indicates that sexually abused children express significantly higher levels of psychoticism, hostility, anxiety, somatization, phobic anxiety, paranoid ideation, depression, obsessive-

compulsiveness, and psychological distress compared with their non-abused children⁵, and these psychological problems could have long-term impact on their mental health that carry into their adulthood.

The above two cases further confirm our belief that excluding psychological harm in the definition is inaccurate in describing what could possibly constitute ‘serious harm’. Therefore, we recommend that ‘serious harm’ should include ‘serious bodily and psychological harm’. It could avoid the inflexibility of constraining ‘serious harm’ to particular types of assaults in the statutory definition, but at the same time gives thought to being more express in defining what can possibly constitute ‘serious harm’.

B. Create an enabling environment for child-related professionals to fulfil their child safeguarding responsibility

As mentioned earlier in the comment, the main purpose of the newly proposed offence should be to protect children by serving as a deterrent to inactions against suspected or witnessed child abuse. However, many child-related professionals are already facing a lot of difficulties or even held in predicament to act against suspected child abuse. If we do not address these concerns and implement no measures to help them ‘take reasonable steps’ to protect the victim from harm, the law will only be another offence to impose more criminal liability, without serving the purpose of motivating the professionals to uphold their duty of care towards children.

The following paragraphs will start by describing the difficulties child-related professionals face in reporting (suspicions of) child abuse to external authorities, and how supplementary measures should be implemented to create a more enabling environment for the child-related professionals to ‘take reasonable steps’ as required by the law, which includes but is not limited to reporting suspicions of abuse to relevant authorities.

⁵ Haj-Yahia, & Tamish. (2001). The rates of child sexual abuse and its psychological consequences as revealed by a study among Palestinian university students. *Child Abuse & Neglect*, 25(10), 1303-1327.

Recommendation 4

We recommend that the following supplementary measures be implemented to **create a more enabling environment** for child-related professionals to ‘take reasonable steps’ to protect a child victim from harm:

- A) Establish a clear reporting guideline
- B) Whistleblower legal protection
- C) Make the institution accountable in reporting institutional child abuse and setting up Child Safeguarding Policy
- D) Provide child safeguarding awareness building and education to child-related professionals
- E) Involve children in their own protection
- F) Establish a robust and proactive child protection system to follow up child abuse allegations

Supplementary measures

Recent cases of institutional child abuse in Oxfam and Boy Scout are acute reminders that child abuse could also happen within the institution, and worse, it could be systematically swept under the carpet for years, endangering the safety of all so many children having day-to-day contact with these child-related organisations.

While it might be comparably easier for child-related professionals to report family child abuse to external authorities, it could be particularly challenging for child-related professionals to take the same appropriate steps to protect a child who is abused within the very institution he/she is working in.

As reporting institutional child abuse externally carries with potential risks to the organisation’s reputation and funding, this act is usually seen as a ‘divisive’ and ‘disloyal’ act of an employee. Therefore, it is common practice for the professional to report to the head of the institution or their supervisor first, or simply choose not to bring up the issue to avoid ‘causing trouble’. While it can be a good practice for professionals to seek other professionals’ second opinion on the case of child abuse, this internal reporting mechanism could create confusion on the responsibility to report and it may end up having nobody reporting the case to relevant authorities after lengthy discussions. The head of the institution might also deter the practitioner from making a report externally to avoid costs to the reputation of the organisation. If no proper guidelines are provided, practitioners may either deem their professional duty of care fulfilled if their concern has already been made known to their supervisor, or it is believed the case has already been reported to the authority by other

professionals, causing a ‘bystander effect’ on institutional child abuse reporting; or even worse, find himself pressurized to silence by the head of the institution even when he considers external reporting necessary.

Therefore, to ensure that child-related professionals can better fulfil their responsibility to protect a child, especially one who is abused within an institution, we recommend the following measures should be implemented to supplement with the proposed offence:

(A) Establish a clear reporting guideline

In order to avoid the bystander effect of the ‘diffusion’ of responsibilities among professionals, many countries have established detailed guidelines on the procedures of notification within the institution and reporting to external authorities, and clear lines of accountability on reporting. For instance, laws in 15 U.S. states have established that the mandatory reporter is not relieved of his or her responsibility to report regardless of any internal reporting policies within the organisation⁶, some U.S. states like Kansas go further in establishing that ‘believing another mandatory reporter has made a report’ is not a proper defense for not making a report⁷.

We suggest that the Hong Kong government should also establish similar reporting guidelines on what professionals and the head of institutions should do when institutional abuse occurs. With this guideline in place, child-related professionals will then have a clearer picture of what ‘reasonable steps’ are expected from them when institutional child abuse occurs.

(B) Introduce whistleblower legal protection

While reporting to external authorities is not the only step to take in response to child abuse, in some cases it may be the only appropriate action to protect the child abused in an institution, especially when a child-related professional is faced with a supervisor who refuses to follow-up with the internal child abuse report, or even pressurizes him/her to silence.

By making it unlawful for any employer to discriminate against or victimize any employee who has made a report of child abuse externally in good faith, it enables the employees to report to external authorities when it is deemed necessary without fear of endangering their career. To facilitate reporting, we recommend that victimization protections similar to those provided to reporters of sexual assault under the Sex Discrimination Ordinance, Cap 480 should be set up under this law to provide proper protection for whistleblowers.

⁶ Mandatory reporters of child abuse and neglect. (August 2015). p.3. Retrieved from <https://www.childwelfare.gov/pubpdfs/manda.pdf>

⁷ The Kansas Department for Children and Families. (July 2016). A Guide to Reporting Child Abuse and Neglect. p.14

(C) Make the institution accountable in reporting institutional child abuse and setting up Child Safeguarding Policy

(i) Mandatory reporting on institutional child abuse

While it is the absolute duty of the child-related professional to take appropriate steps to protect the child victim, placing the responsibility on reporting institutional child abuse can also make it easier for its employees to fulfil their child safeguarding duty.

In some jurisdictions like New South Wales in Australia, for instance, a reportable conduct scheme was established to require the head of child-related institutions to notify the authority within 30 days of any reportable conduct (including sexual offence, sexual misconduct, assault, ill-treatment or neglect committed against a child) within the institution of which they become aware.

When reporting becomes ‘a matter of law’, and the institution head knows that it is a statutory requirement to report institutional child abuse externally, a child-related practitioner will find it easier to bring up child safeguarding concerns more openly within the institution and report the case when necessary.

(ii) Establish Child Safeguarding Policy in the organisation

Also, the institution head should be held accountable to set up child safeguarding policy and procedures to protect children within the organisation, and invest more resources to train their staff on protecting children. To motivate institutions to establish such measures, the Hong Kong government can take reference from England and Australia in setting minimum child safeguarding standards for all child-related organisations to follow, thus making it mandatory for child-related organisations to make their organisations safe for children.

With child safeguarding policy in place, the child-related professionals who work in the organisation will enjoy a more open and supportive environment to address child safeguarding concerns, which help bring the suspected child abuse cases to the fore when necessary.

(D) Provide child safeguarding awareness building and education to child-related professionals

In the proposed offence, a person who has duty of care towards the child victim commits the offence if he/she ‘were aware or *ought to have been aware* that there was a risk that

serious harm would be caused to the victim by the unlawful act or neglect’, and failed to take reasonable steps to protect the child victim.

To increase all the child-related professionals’ *sensitivity* to risks of harm, child safeguarding education should be provided to child-related professionals in their regular training courses so they can be in a better position to detect indicators of risks of harm and protect the child victim. Child safeguarding education should include:

1. the definition of children’s best interest
2. the early identification and indicators of child abuse;
3. definitions and examples of child abuse, grooming and child exploitation;
4. the characteristics of victims, offenders, and risky environments and situations;
5. understanding and responding to harmful behaviours by a child towards another child; and
6. proper recording and reporting procedures when child abuse arises, regardless of where the abuse takes place

Apart from increasing the professionals’ sensitivity to risks of harm, police and investigators should also receive appropriate training on child safeguarding, including sensitivity training to gender issues, child development and psychological needs, so that professionals can initiate more child-friendly procedures to protect children from harm. The more child-friendly the child protection system is, the more likely child-related professionals will report suspected child abuse cases to authorities, having assurance that children will be well-protected by the state after reporting.

(E) Involve children in their own protection

It goes without saying that adults are the duty bearers and have the absolute duty to protect children from harm. However, children are the ones who understand their situations the best, and therefore should also be engaged in their own protection so we can protect them more effectively.

Therefore, apart from enhancing child-related practitioners’ sensitivity to risks of harm, children should also be equipped with education about their rights, knowledge of self-protection strategies to protect themselves and other children. More importantly, resources should be allocated to establish more child-friendly complaint procedures in the child welfare system or child-related organisations, so that children would know how to seek help when child abuse occurs.

(F) Establish a robust and proactive child protection system to follow up child abuse allegations

Apart from the supplementary measures to make reporting of child abuse cases more easily known by the authorities, much efforts should be put into ensuring that the reporting leads to proper protection for the child. Ensuring the abused child would receive timely and effective protection from the authorities after reporting is as equally important as reporting the case itself.

(i) Adequate resources to execute welfare plans

One of the factors affecting the responsiveness of the child protection system is the *availability of resources to execute welfare plans*. According to the official statistics from the Social Welfare Department in 2016, children wait an average of 4.4 months trying to get into small group homes⁸. The lack of resources in the child residential care services especially endangers the safety of children under familial abuse. Without access to emergency residential care services after being discharged from hospitals, these battered children will be forced to go back to their family and be placed in further risks of harm.

While the existing child protection resources are scant, this situation might be further exacerbated by the establishment of this law, with more professionals being aware of their duty of care and take appropriate steps to report the case the authorities. Without enhancing the child protection system with adequate resources, we will only put children under abuse further at risk of harm even after the case is made known to the authorities. This is especially the case for familial child abuse, where the parents might become disengaged and withdraw from services of a child-related organisation, leaving the practitioner helpless in protecting the child with no support from the authorities and no further engagement with the parents.

(ii) Establish statutory response time assignment for different types of cases

Currently, there is *no* statutory guideline requiring the Social Welfare Department to respond to suspected child abuse cases within a particular time frame, leaving the practitioner bewildered and the allegedly abused child helpless even after the case has been reported by the frontline practitioner.

On the contrary, other countries have established clear statutory requirement for the designated authorities to follow up the child abuse cases within a particular time frame. For instance, in the U.S. state Kansas, the Department for Children and

⁸ Residential Child Care Services. (21 February 2017). Legislative Council House Committee, Subcommittee on Children's Rights. Retrieved from https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120170221cb4-577-1-e.pdf

Families need to respond on the same day if the child is in imminent risk of serious harm, 72 hours if the alleged abuse does not pose the child in imminent risk of serious harm, and 20 working days if the child may be in need of services for reasons not related to maltreatment⁹. With clear response time assignment for different types of cases, frontline practitioners will then have better assurance on proper follow-up of the cases after the case has been reported.

(iii) *Incorporating children's voice in the review of their care plans*

Apart from acting promptly to reported child abuse cases, 'review of care plans' is as equally important in ensuring children's best interests are protected in the child protection system. The outcomes of reporting can vary enormously from screening the referral out with no further action to placing a child outside the home, which result from the decisions and have serious impact on the development and protection of the child victim. All too often we see children being stuck in emergency placements or rotating from foster home to other residential care services without any permanency plans, and the social worker might not have the sensitivity or skills to engage children in the decision-making process on their care plans.

Case 1: A girl whose mother was murdered by her father at the age of 12 was put to residential care home after her father was incarcerated for his crime. She repeatedly told her social worker that she hated her father and would not accept any arrangements to live with her father again. However, the social worker still requested the girl to reside with her father after he was released from the prison when she was 15 years old, causing the girl to attempt suicide.

The case demonstrates how important it is to incorporate children's voice in the review of their care plans to make best arrangements for their physical and psychological well-being. We recommend that social workers should receive more sensitivity training to engage children in decision-making that affects them.

Conclusion

We welcome the bill as an initial step to make progress in child protection. However, we regard that much more should be done to create a more enabling environment for carers and those who work around children to uphold their duty of care, apart from merely imposing more criminal liability on them. The new offence is regarded as a preventative measure to make sure those who

⁹ The Kansas Department for Children and Families. (July 2016). A Guide to Reporting Child Abuse and Neglect. p.17

work around children uphold their responsibility to protect children and all other vulnerable persons. However, care needs to be taken to define the scope of the offence so that it does not put children at risk of prosecution unreasonably. Also, to better serve the purpose of the law, a comprehensive review of the child protection system and other measures should supplement the law to create a more enabling environment for child-related professionals to take reasonable steps for children's safety.